IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LESTER J. POPE, Superintendent of California Medical Facility at Vacaville, Appellant, vs. THEODORE MONROE HARPER, Appellee.	No. 22590

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Appellee, a California state prisoner, filed an application for writ of habeas corpus pursuant to 28 U.S.C. 2241 et seq., seeking his release from the California Medical Facility at Vacaville, California. The writ was granted by the United States District Court for the Eastern District of California. A certificate of probable cause to appeal was issued October 26, 1967. This appeal is by the State of California pursuant to 28 U.S.C. 2253.

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appellee's release (Tr. 85-90). Release was stayed for 90 days or such additional period as may be granted by the Court to afford the State of California an opportunity to grant petition a new trial or take such other steps as the Court may deem appropriate (Tr. 90).

A certificate of probable cause to appeal was issued October 26, 1967 (Tr. 93). Notice of appeal was filed October 31, 1967 (Tr. 96). The state court judgment herein resulted from appellee's conviction in the Superior Court of the State of California, for the County of Los Angeles on March 20, 1963 for violation of Penal Code section 261.3 (rape), two violations of Penal Code section 288a (oral copulation by force); violation of Penal Code section 207 (kidnaping), violation of Penal Code section 4532b (escape), and a violation of Penal Code section 245 (assault by force likely to produce great bodily injury) (Tr. 31).

The California Court of Appeal, Second Appellate District, reversed the convictions in Case No. 2 Crim. 9082. Thereafter, a petition for rehearing was filed and granted and by unpublished opinion dated October 27, 1965, the judgments of the superior court were affirmed. Alleged Griffin error was found nonprejudicial under the California Harmless Error Rule. Appellee's application for a hearing by the California Supreme Court was denied January 12, 1966.

STATEMENT OF FACTS

On the morning of August 18, 1962, Sandra Jeanne Markle went to eat breakfast at Shipp's Restaurant in Westwood Village, Los Angeles (RT 38-39). Appellee walked into the restaurant and followed her as she left and went shopping (RT 40-43). Appellee gave her his name, told her that he was a dentist, that his wife had just died, and that he could show her around the village since he knew the area (RT 45, 50) Without request, Harper carried Sandra's groceries back to her apartment and entered uninvited. After several refusals to go out with him, she accepted but thereafter wrote a note saying she wasn't home (RT 55-56). Sandra then went to the apartment of her neighbor, Connie Forbes, where appellee again appeared 20 minutes later. After several additional requests to go out, she acquiesced in the presence of Connie to going to his house for an hour for dinner (RT 140-141). Her acceptance was influenced because she knew the area where he lived, it was not yet dark, and the date was only for an hour (RT 60-65). Connie Forbes saw Sandra leave 15 minutes later (RT 148).

At the residence claimed to be appellee's they had dinner. After dinner, they danced and Harper then began telling "sex jokes" (RT 73-74). When he started to kiss her, Sandra got up to leave, whereupon he threw her down, put his hands around her throat, and told her to unbutton her blouse (RT 75, 78). She complied out of fear (RT 83). When she

again attempted to leave, he again threw her down and began choking her until, in her words, "I thought I was going to die (RT 84-85). The choking caused her neck to bleed and raised welts observed by her neighbor, a friend, and Officer Buckles (RT 96, 132, 142, 150). Sandra was ordered to remove her clothing. Out of fear for her life, she submitted to two acts of sexual intercourse in another room and violations of California Penal Code section 288a (RT 88-96). At the conclusion of this ravishment, she was told by Harper not to tell anyone what had happened.

It later appeared that the name given to her by appellee was his brother's and that the residence also belonge to his brother (RT 151, 262). Harper gave various accounts of his presence at this house at the time of his arrest and twice attempted to escape from police custody (RT 152-155, 159, 167-168, 182).

SPECIFICATION OF ERRORS

1. Appellee has deliberately bypassed his state court remedies by intentionally electing not to file a petitio for hearing in the state court following the denial of his motion to recall the remittitur in the Court of Appeal.

2. The District Court erred in concluding that comment upon appellee's failure to testify in violation of Griffin v. California, 380 U.S. 609, was not harmless beyond a reasonable doubt.

SUMMARY OF ARGUMENT

The transcript of record in this case reflects that appellee deliberately bypassed his state court remedies in this case by intentionally withdrawing subsequent motions for relief by way of petition for rehearing and petition for hearing in the California Supreme Court following the denial of his motion to recall the remittitur in the California Court of Appeal.

Error in commenting on appellee's failure to testify prior to the decision of the United States Supreme Court in Griffin v. California, 380 U.S. 609, was harmless beyond a reasonable doubt under the Fahy-Chapman standard. This conclusion follows from the overwhelming weight of uncontroverted direct evidence presented by the prosecution in its case in chief coupled with uncontroverted rebuttal evidence which esta lished the futility of the defense of unconsciousness to the point of demonstration.

ARGUMENT

I. APPELLEE HAS DELIBERATELY BYPASSED HIS STATE COURT REMEDIES

In this case, appellee filed the instant petition for habeas corpus without having first presented his contention to the requisite state courts. On March 2, 1967, the United States District Court for the Eastern District of California directed appellee to file with the California Court of Appeal a motion to recall the remittitur pursuant to Rule 25, California Rules on Appeal. Jurisdiction was retained pending the application (Tr. 11-12). The order to show cause was issued on March 22, 1967, on appellee's assertion that the motion was denied on March 9, 1967 (Tr. 15-16). Appellant is informed and believes and thereon alleges that such denial was not entered until March 27, 1967.

As the records of the state court will reflect, however, no petition for hearing was ever filed in the California Supreme Court following the denial (see People v. Randazzo (1957) 48 Cal.2d 484, 310 P.2d 413). The highest Court in the state, whose decision in People v. Chapman and Teale (1965) 63 Cal.2d 178 (Rvd. Chapman v. California (1967) 386 U.S. 18) formed the basis for the error which appellee now asserts, has never had an opportunity to pass upon this important question.

The record in this case reflects that appellee is aware of this procedure because it was invoked on his original

appeal. His petition for hearing on the original appeal was denied on January 12, 1966. More importantly, a letter written by appellee on March 25, 1967 (Tr. 19-20) reflects not only his awareness of state procedures and federal procedural rules, but also specifically states that he requested the California Court of Appeal to withdraw any subsequent motions for further proceedings in the state courts. Considering the District Court's order and appellee's awareness of the procedure, it can only be concluded that he has deliberately bypassed his state remedies. See U.S. ex rel Holloway v. Reinke (1964) 229 F.Supp. 132, 139; Kuhl v. United States, 370 F.2d 20 (9th Cir., 1966).

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT COMMENT UPON APPELLEE'S FAILURE TO TESTIFY IN VIOLATION OF GRIFFIN v. CALIFORNIA, 380 U.S. 609, WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

Appellee Harper was tried and convicted in 1963 for the offenses for which he is now incarcerated. Thereafter, the United States Supreme Court announced its decision in Griffin v. California (1965) 380 U.S. 609, which condemned California's practice and constitutional provision, Article I, section 13, which sanctioned comment upon a defendant's failur to testify. For this error, appellee's convictions were reversed on appeal, but a rehearing was granted and on the authority of People v. Bostick (1965) 62 Cal.2d 820, 44 Cal. Rptr. 649, 402 P.2d 529, the judgments of conviction were affirmed by the application of California's harmless error

provision, California Constitution Article VI, section 4½ (now Art. VI, § 13).

Appellee Harper then filed the petition for writ of habeas corpus in this case alleging error in failure to apply the harmless error standard applicable to federal constitutional error announced in Chapman v. California (1967) 386 U.S. 18. The United States District Court for the Eastern District of California granted the writ, stating:

> "After carefully reviewing the entire argument of the prosecutor in this case, I am not convinced that the comments in regard to the failure of the defendant to testify were harmless under the Fahy-Chapman standard. The prosecutor's remarks on this point were persistent and repetitious. Furthermore the prosecutor's remarks were accentuated by the giving of CALJIC Instruction No. 51 (Revised) in a form modified by the trial judge. Accordingly I conclude that the petitioner is entitled to a trial which is free of the unconstitutional influence to which he was subjected." (Tr. 90.)

Appellant respectfully submits that there is no reasonable possibility that the comment and instruction in this case could have contributed to appellee's convictions. We initially observe, of course, that error in commenting upon a defendant's failure to testify in violation of Griffin does not require automatic reversal; Griffin error may be

declared harmless beyond a reasonable doubt in an appropriate case (Chapman v. California, 386 U.S. 18, 22). The United States Supreme Court in Chapman specifically rejected the contention that all constitutional error requires reversal per se. The Court went so far as to note the value of harmles error rules for they " . . . serve a useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, liklihood of having changed the result of the trial . . . . " Chapman v. California, 386 U.S. 18, 22. Thus, this case must not be reversed if the error can be declared harmless beyond a reasonable doubt.

We also note, however, as did the California Supreme Court, that the writ need not be granted for the sole reason that we might be able to conceive of some possibility, however remote, that a jury could have been marginally influenced by the comment in question. The Chapman test is couched in terms of "reasonable doubt" and, as the courts tell every juror who sits in judgment in a criminal case, a reasonable doubt must be more than a "possible" doubt, since complete certainty is unattainable in the affairs of men (People v. Modesto (1967) 66 Cal.2d 695, 712, 59 Cal.Rptr. 124, 427 P.2d 788). In this connection, we are dealing with reasonable possibilities and honest, fair-minded jurors (Chapman, p. 26).

The evidence in this case was overwhelming against appellee. The victim, Sandra Jeanne Markle, first testified for the prosecution to the crimes occurring on August 18, 1962

(RT 35). Appellee saw her and followed her to her apartment that morning despite her attempts to discourage him (RT 40-41) He had attempted to engage her in conversation by telling her that he lived in the neighborhood, that his wife had recently died, and that he worked as a dentist in a particular office building (RT 50). After several refusals to accept a date with appellee, Sandra Jeanne Markle finally acquiesced, in the presence of a neighbor, to accompany petitioner to dinner for an hour. This acceptance was influenced by the fact that it was still light out, she knew the area, and the date was only to last an hour (RT 60-65). Her neighbor, Connie Forbes, corroborated these facts and saw Sandra leave on the date 15 minutes later (RT 137-141, 148). The victim testified to conduct establishing the sexually motivated offenses charged in Counts I, II, III, V and VII (RT 74-98). Compliance with appellee's actions was secured by choking her until, in her words, "I thought I was going to die." The choking caused her neck to bleed (RT 75, 85, 96). Afterwards, appellee told her not to tell anyone about the events of the evening (RT 98).

Upon her return to the apartment, Sandra told Connie Forbes what transpired and the police were summoned (RT 142-147). Connie observed the redmarks on Sandra's face and throat (RT 142). Frances Breen, a friend who stopped by that evening testified to the same effect (RT 131-132). One of the arresting officers, Jess R. Buckles, also observed the throat marks (RT 150).

Appellee was arrested later that evening. He tried to pretend that no one was home and started to slip out the side door when he was arrested. It was then discovered that the residence did not belong to appellee as claimed, but rathe to his brother, who was the dentist (RT 151, 262). At this time, appellee stated that he was a relative taking care of the house (RT 152). He later stated that he was a transient from Chicago and gave a false name (RT 155, 159, 182). When appellee was taken to the prosecutrix, he was immediately identified as her assailant (RT 153-154). Officer Buckles also testified to an attempt by petitioner to escape from his custody en route to the jail (RT 153-154). Another escape was attempted after booking (RT 167-168). To show the use of force by appellee and the lack of consent by Sandra Markle, the prosecution also introduced the testimony of three witness who testified to prior offenses by appellee involving similar conduct - drinking, obscenities, and choking (RT 194, 219, 232

The evidence in this case was not, as in Chapman, a reasonably strong circumstantial web of evidence against appell this was an irrefutable web of direct evidence. This direct evidence was supplied not only by the victim, Sandra Markle, who testified to the sexual crimes committed against her on August 18, 1962, but also by the corroborative testimony of those who saw her with appellee and who witnessed her dis-sheveled appearance and the red marks and bruises on her face and throat. Additional evidence was supplied from appellee's

guilty conduct; his false and inconsistent explanations at the time of his arrest that same evening and his attempts to escape on two subsequent occasions. There was in this case no absent witness to the crimes themselves as in Fontaine v. California, ___ U.S. ___ (4/8/68), where the informer who purchased narcotics was not even called. There was no weaknes inherent in the prosecution evidence itself as in Anderson v. California, ___ U.S. ___, No. 652 Misc. (4/1/68), where the People's evidence not only showed the defendant's denials, but also reflected that the victim of the forgery himself knew the defendant and his brother, but nevertheless allegedly accepted a check issued to a third person. In this case, there is no similar gap in the People's evidence that could be or had to be filled by comment. But more importantly, there was no defense attempt to controvert this evidence. The defense here accepted unqualifiedly the commission of the acts alleged, but sought to suggest the defense of unconsciousness (Calif. Pen. Code § 26(5)). (RT 259-262) Comment was harmless beyond a reasonable doubt

The conclusion of harmlessness is fortified by the instruction, CALJIC 51 (Revised), which is only partially reflected in Chapman at footnote 2. The instruction continues and contains cautionary material (CST 44). It tells the jury that if a defendant does not have knowledge he would need to deny or explain, it would be unreasonable to draw an inference against him. What more perfect case for the application of such a qualification than where the sole defense is the

suggestion of unconsciousness - the defendant is unconscious of what transpired? This is not the circumstantial case represented by Chapman where Mrs. Chapman was arrested not at the scene as was appellee in this case, but in St. Joseph, Missouri, and where a critical question requiring explanation was the alleged bus ride from Ukiah (see People v. Teale, 63 Cal.2d 178, 185). There is no possibility that comment could have any prejudicial effect under this instruction because the facts were direct, precise, and uncontroverted. On the facts of this case, if the defense of unconsciousness were accepted, no inference could be drawn. The same rationale logically applies to the sanity phase of the trial. Moreover, the instruction also informs the jury that the failure to explain or deny does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden (elsewhere explained (CST 5-6) of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. The adjuration is repeated that no lack of testimony on defendant's part will supply a failure of proof by the People (CST 44). Also, elsewhere, the jury was instructed that if the evidence was susceptible of two interpretations, each reasonable, one pointing to guilt, the other to innocence, it was the jury's duty under the law to adopt that interpretation which will admit of innocence, rejecting that of guilt (CST 31).

The conclusion that error was harmless beyond a reasc

able doubt is equally clear respecting the defense. The defense introduced the testimony of three psychiatrists, who had examined appellee two years previously for a different purpose. They stated that appellee had a form of epilepsy in 1960 (RT 338, 362, 407). Defense counsel contended that this evidence showed continued epilepsy two years later on the dates in question because epilepsy is incurable (RT 269, 625). One of appellee's own psychiatrists specifically stated however, that he had no knowledge whether appellee was in a seizure of any type on the dates in question (RT 352). Anothe defense psychiatrist testified that the condition was activate by drinking (RT 407), but this was contradicted by the defense itself when it introduced the testimony of a girl who went out for a drink with appellee in August of 1962, but appellee did nothing to her (RT 463)[2/]. The People in rebuttal introduced the testimony of the Medical Director of the County Facilities of Correction, appointed by the Court, who found no evidnece of epilepsy in September 1962, the time in question (CT 15, RT 551-6). Hestated also that appellee had three times refused to submit to an electroencephalogram although appellee had undergone these tests four times in years

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2/ This evidence was apparently adduced to preclude a voluntary intoxication argument (RT 465).

previous.[3/]

Other evidence demonstrates that the possibility of unconsciousness as a defense evaporated into inherent incredibility in this case. Appellee not only had previously admitted that he had never suffered epilepsy or blackouts, RT 498, but he also had previously stated that he had influenc and manipulated psychiatric testimony before a court and that prescriptions of dilantin got him out of serious police troubl (RT 600-601). Uncontradicted was the testimony in rebuttal of Dr. Hunter Brown, a neuro-surgeon, that an epileptic seizure i evidenced by the victim's loss of recall for the experience (RT 653). Appellee's conduct on the day in question, from his introduction to the victim under a false name, the invitation to a house falsely described as his own, the conduct at the home resulting in the crimes charged, his recital of past and future events, and his order not to tell others about the events were a total negation of an epileptic conditi on August 18 and 19, 1962 (RT 660-661). Dr. Brown stated it would be impossible for a person to be, at that time, in a state of epileptic seizure (RT 657-658).

3/ Three of the four previous tests reflected normal records (RT 514-516). The fourth test consisted of two reading the second of which was within normal limits (RT 637). The first reading only suggested "spiking" which is only sometimes associated with psychomotor epilepsy (RT 640-642). It could not be said that the person on whom the reading was taken had any form of epilepsy. Hyperventilation, a method of deep breathing utilized to produce latent deviations, failed to produce such results (RT 643-644).

Thus, although defense evidence standing alone may have suggested the barest possibility of unconsciousness as a defense, the evidence in rebuttal completely established its futility to the point of demonstration. Apart from the comment in this case, no reasoning juror could have reached a contrary result. The comment served to heighten the prosecution's case not one iota. In a word, it was superfluous.

No defense evidence related to the year in question, much less the dates in question. Assuming that we are dealing with honest, fair-minded jurors who consider the evidence and the instructions, there is no possibility, no reasonable possibility, of a resultmore favorable to petitioner in the absence of the constitutionally forbidden comment. It can be declared beyond a reasonable doubt, that comment on appellee's failure to testify was harmless. In this case, the "benefit" found by the Supreme Court to exist in harmless error rules ma properly be invoked for they " . . . serve a useful purpose insofar as they block the setting aside convictions for small errors or defects that have little, if any, liklihood of havin changed the result of the trial. . . . " Chapman v. Califomia 386 U.S. 18, 22.

CONCLUSION

For the foregoing reasons, appellant respectfully submits that the ruling of the District Court herein should be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

ARNOLD O. OVEROYE